Supreme Court of the United States

October Term, 1973

No. 72-706

73-978

Supreme Court, U.
FILED
JAN 28 1974
MICHAEL RODAK, JR., C

DAVID MONTAGUE, Mayor of Hampton, Va. et al.

Petitioners

V.

PATRICIA HOGGE,
EARLE PHILLIPS,
T/A Paridise Massage Parlors
BO-JAC, LTD.,
T/A Miss Masseuse

Respondents

J. W. HORNSBY, JR., Mayor of Newport News Va., et al.

Petitioners

V.

EARLE PHILLIPS,
T/A French Massage Parlor
SCARLETT ANNE HILLIARD,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

Kenneth C. Hogge
Carmel, Gray & Hogge
United Virginia Bank Building
Hampton, Virginia 23669

Counsel for Respondents

INDEX

Page

Questions Presented..... 3

Statement of the Case..... 3

Reasons for Denying the Writ

I. Summary dismissal by this Court of a decision by the Supreme Court of Virginia involving a different ordinance and different parties did not require the District Court in this case to dismiss Respondent's complaint where a substantial change in the state of the relevent law has taken place and Respondents have raised constitutional and statuatory arguments which were not previously before this Court..... 11

II. Petitioners seek to raise factual issues before this court which were not raised before the District Court of the Court of Appeals and thus are requesting the Court to make findings of fact which are in direct contradiction with the findings of fact of both lower courts..... 14

Page

III. The decision by the Court of Appeals that considerations of comity do not dictate abstention by the District Court where no criminal prosecutions were pending at the time the suits were instituted is in accordance with the previously announced decisions of this Court.....15

Conclusion.....18

Appendices

Motion to Dismiss in the Circuit Court for the City of Hampton, Virginia.....1a

Transcript, District Court Hearing of July 7, 1972.....3a

TABLE OF AUTHORITIES

Cases:	PAGE
Berenyi v. Imigration Director 385 U.S. 630 (1966).....	14
Deane Hill Country Club, Inc. v. City of Knoxville 379 F.2d 321 (5 Cir.) cert. den, 389 U.S. 975 (1967).....	12
Dillenberg v. Kramer 469 F.2d 1222 (9 Cir. 1972).....	13
Graver Mfg. Co. v. Linde Co. 336 U.S. 271 (1948).....	15
Hall v. Thornton 445 F.2d 834 (4 Cir. 1971).....	12
Heaney v. Allen 425 F.2d 869 (2 Cir. 1970).....	12
Kemper v. Calhoun 111 Va. 428, 69, S.E. (1910)....	5
Kisley v. City of Falls Church, Va. 212 V. 693, 187 S.E.2d 168 (1972) app. dism. ____U.S._____ 93 S.Ct. 237 (1972).....	7,11
Lake Carrier's Assoc. v. McMullen 406 U.S. 498 (1972).....	17

Patterson v. City of Newport News
364 F.2d 816 (4 Cir. 1966) appeal dismissed and cert. den. 385 U.S. 650, reh. den. 386 U.S. 969 (1967)..... 12

Perez v. Ledesma
401 U.S. 82 (1971).....11, 17

Port Authority Bondholders Protective Comm. v. Port of New York Authority.
387 F.2d 259 (2 Cir. 1967)..... 12

Samuels v. Mackell
401 U.S. 66 (1971) 15

United States ex rel Epton v. Nenna
446 F.2d 363 (2 Cir.) cert. den.
404 U.S. 948 (1971)..... 12

Younger v. Harris
401 U.S. 36 (1971)..... 6, 15

Zwickler v. Koota
389 U.S. 241 (1967)..... 16

Statutes:

42 U.S.C. 2000e..... 9

Other Authorities

Stern & Gressman, Supreme Court Practice, 1969..... 14, 15

Sweeny, Non Suits in Virginia
52 Va. L.R. 751 (1966)..... 5

Wright, Federal Courts, 1970..... 15

QUESTIONS PRESENTED

1. Whether summary dismissal for want of a substantial federal question by this Court from a decision by the highest court of a state precludes a determination of constitutionality where different parties are challenging different ordinances and substantial changes in the applicable law have occurred.

2. Whether a federal district court is required to abstain from exercising its jurisdiction in cases in which a local ordinance is being attacked on the grounds it is facially unconstitutional and in direct conflict with the 1964 Civil Rights Act, 42 U.S.C. 2000e, where there is a finding that no criminal prosecutions were pending against the plaintiffs at the time the suit was initiated.

STATEMENT OF FACTS

On March 22, 1972, the City Council of Hampton, Virginia, adopted Chapter 22.1 of the Hampton City Code. That ordinance provided, inter alia, that:

> WHEREAS, upon report of the Division of Police, administrative officers, and inhabitants of the City, such places called "massage parlors", and similar establishments as hereinafter defined are being used, or may be used because of their nature, as houses of prostitution, or places where disorderly, lewd, lascivious and unlawful conduct or exhibitions occur;...

> It shall be unlawful to administer, for hire or reward, to any person of the opposite sex any massage, any alcohol rub or similar treatment, any fomentation, any bath, or any electric or magnetic treatment, nor shall any person cause or permit in or about his place of business or in connection with his business, any agent, employee or servant or any other person under his control or supervision to administer any such treatment to any person of the opposite sex.

On March 23, 1972, Bo-Jac, Ltd., a corporation which owns and operates Miss Masseuse Massage Parlor, filed a petition in Hampton Circuit Court seeking a temporary injunction (see Appendix, page a2, Transcript of Hearing of July 7, 1972, U. S. Dis. Ct., p. 7), at which time the petition for a temporary injunction was denied and the proceedings stayed until such time as amended pleadings requesting a determination on the merits could be filed. On March 29, 1972, Mr. Justice I'Anson of the Supreme Court of Virginia also denied a request for a temporary injunction. No further pleadings were filed in the Hampton Circuit Court.

On August 24, 1973, the case was dismissed without prejudice by the Circuit Court, no determination on the merits ever having been requested or

adjudicated.[1]

On April 3, 1972, in the United States District Court for the Eastern District of Virginia, Patricia Hogge, Earle Phillips and Bo-Jac, Ltd.[2] sought a temporary restraining order against the enforcement of Chapter 22.1 of the Hampton City Code. The Plaintiffs alleged that Chapter 22.1 violated their rights protected by the Fourteenth Amendment to the United States Constitution and by the 1964 Civil Rights Act, 42 U.S. Ca. A 2000e.

---

1. See VA. CODE ANN. §§ 8-220 (1957), Sweeny, Non Suits in Virginia, 52 Va. L. R. 751,758. Petitioners' reliance on Kemper v. Calhoun 111 Va. 693 695 E. 358 (1910) (Petitioners'Brief p. 11 n.2) is misplaced. Sweeny points out " t he Kemper case itself recognizes that the inconvenience and expense of double litigation were not sufficiently prejudicial to the defendant to justify a denial of a non suit".p. 756.

2. Petitioners state that James Hogge was a Plaintiff in this case and the state court proceeding. James Hogge has never been a Plaintiff in either proceeding involving the Hampton ordinances. It should also be pointed out that Patricia Hogge and Earle Phillips were at no time plaintiffs in the state court proceeding.

On April 19, 1972, the District Court entered a Memorandum Order staying further proceedings pending a final disposition of the proceedings involving Bo-Jac in the Hampton Circuit Court. As previously noted, no determination in the merits was sought and the suit was subsequently dismissed without prejudice.

On July 24, 1972, the District Court entered an order dismissing the case on the grounds that the principles of comity expressed in Younger v. Harris 401 U.S. (1971) were equally applicable to cases involving pending and non-pending state criminal prosecutions. Plaintiffs were therefore precluded from seeking declaratory and injunctive relief from the federal district courts.

> As is readily apparent from Younger v. Harris, the appropriate forum foran initial challenge to the constitutionality of a state law is a state court...Plaintiffs have two means of presenting their constitutional claims to federal tribunal....if Plaintiffs pursue their civil action in the state courts and not successful, they may petition the Supreme Court of the United States for a certiorari. In the alternative, Plaintiffs may elect to present their claims as defenses in criminal proceedings, if such are instituted by the City of Hampton; again, Plaintiffs may petition the United

States Supreme Court for certiorari if they are unsuccessful in pursuing their available state remedies.

The Court also expressed the view that it felt bound to abide by the decision of the Supreme Court of Virginia in Kisley v. Falls Church 212 Va. 693, 187 S.E. 2d 168 (1972), app.-dism. U.S. (1972) even though the parties and ordinances were different, since

"the result of entertaining Plaintiffs' claim to a determination on the merits would be to make this a court of appeals from the Supreme Court of Virginia" (Petitioners' Appendix 10a)

An Appeal to the Court of Appeals for the Fourth Circuit was noted on August 23, 1972.

Newport News

On March 27, 1972, the City Council of Newport News, Virginia, adopted Section 21C of the Newport News City Code, which prohibited the operation

of:

> [M]assage Parlors...or any similar type of business...where any physical contact or massage with the recipient of the service provided by a person of the opposite sex.

The ordinance further provided that:

> It shall be unlawful for any employee, individual owner or operator of such establishment or any other type of establishment to give or administer a massage to any member of the opposite sex.

On April 26, 1972, Earle Phillips[3] and Scarlett Hilliard filed a complaint

---

3. Edward Emerson, the owner of a massage parlor joined Phillips and Ms. Hilliard in the original suit. On October , 1973, Emerson withdrew from the suit and therefore is not a party before this Court. Petitioners' contention that a prosecution was pending against Mr. Emerson at the time the suit was initiated is untimely raised in this Court. Whatever validity this contention might have had as to Mr. Emerson had it been timely and properly raised before the District Court or the Court of Appeals is an idle question since the issue has now been mooted.

for declaratory and injunctive relief in the United States District Court for the Eastern District of Virginia, Newport News Division alleging that the ordinance violated their rights protected by the Fourteenth Amendment to the United States Constitution and the Civil Rights Act of 1964, 42 U.S.C. 2000e. Respondent Phillips alleged that in his capacity as a massage parlor owner he was placed in the untenable position of being forced to violate either the 1964 Civil Rights Act or the unconstitutional Newport News Ordinance. Ms. Hilliard alleged in the pleadings which were sworn to by affidavit that she had been discharged from the position she held as a masseuse directly and solely as a result of the enactment of Chapter 21C.

At the time the suit was initiated criminal prosecutions had not been initiated against either Mr. Phillips or Ms. Hilliard.

Petitioners' statement of the case notes (Petitioners' Brief p. 8) that Phillips was arrested on April 29, 1972, for violating the massage parlor ordinance. This arrest was subsequent to the Respondents' initiating this suit in Court on April 27, 1972. It should also be pointed out that this factual allegation is being raised for the first time in this Court. Petitioners did not raise the issue of a prosecution against Phillips either in the District Court or the Court of Appeals.

On July 24, 1972, the District Court entered a Memorandum Order dismissing the case stating that since the factual situation was similar to that presented in the Hampton Court the same principles of comity required abstention. The sole distinction made between the two cases was that in Hampton prosecution was threatened but had not already begun while in Newport News actual enforcement had begun, a distinction which appears to go to the standing issue raised by the District Court in the companion Hampton case.

On August 23, 1972, an appeal was noted to the Court of Appeals for the Fourth Circuit where the cases were consolidated for hearing.

The Court of Appeals found that

> [W]hen the various suits were filed in the Eastern District of Virginia no criminal prosecutions against any Plaintiff had begun ....in Hampton, no prosecutions have begun...,in Newport News, prosecutions for violation of the ordinance had been instituted at the time of suit, but the prosecutions were against persons other than the Plaintiffs.

The Court of Appeals held that the District Court had erred in abstaining from exercising its jurisdiction in a non-pending situation.

It expressly adopted the view of Mr. Justice Brennan, stated partially in concurance and partially in dessent, in Perez v. Ledesma 401 U.S. 82, 120 (1970) that the principles of comity expressed in Younger do not require the federal courts to abstain from exercising the jurisdiction when no state criminal prosecutions are pending at the time Plaintiffs seek to initiate federal court proceedings.

ARGUMENT

SUMMARY DISMISSAL BY THIS COURT OF A DECISION BY THE SUPREME COURT OF VIRGINIA INVOLVING A DIFFERENT ORDINANCE AND DIFFERENT PARTIES DID NOT REQUIRE THE DISTRICT COURT IN THIS CASE TO DISMISS RESPONDENT'S COMPLAINT WHERE A SUBSTANTIAL CHANGE IN THE STATE OF THE RELEVENT LAW HAS TAKEN PLACE AND RESPONDENTS HAVE RAISED CONSTITUTIONAL AND STATUATORY ARGUMENTS WHICH WERE NOT PREVIOUSLY BEFORE THIS COURT

The Court of Appeals correctly held that Respondents were not precluded from challenging the validity of different ordinances in a case involving different parties, and different federal statuatory and constitutional grounds because of this Courts dismissal of the appeal in Kisley v. Falls Church supra for want of a substantial federal question.

Petitioners cite a number of cases which they feel support their position

that summary dismissal in any case precludes future challenges to the constitutionality of any similar ordinance regardless of whether different parties, and different issues are involved.

In Dean Hill Country Club v. City of Knoxville 379 F 2d 321,325 (5th Cir. 1967)cert. denied, 389 U.S. 975. the Fifth Circuit held that res judicata precluded the same parties from relitigating the same issues again.

U.S. ex.rel. Epton v. Nenna 446 F 2d 363 (2nd Cir. 1971) cert. den. 404 U.S. 948 (1971) also involved the same parties who had previously petitioned for certiorari.

In Patterson v. City of Newport News 364 F 2d 816 (4 Cir. 1966) appeal dismissed and cert. den., 385 U.S. 360 reh. den. 386 U.S. 969 (1967) the Fourth Circuit held that the same parties were precluded from relitigating the same issues. A decision which was later reaffirmed in the companion case to this suit when the Court held that Robert Kisley was precluded by Kisley v. Falls Church supra from relitigating the constitutionality of the same ordinance he had earlier challenged.

Hall v. Thornton 445 F 2d 834 (4 Cir. 1971) Heany v. Allen 425 F 2d 869, 870 (2 Cir. 1970) and Port Authority Bondholders Protective Comm. v. Port of New York Authority 387 F 2d, 259, 262 (2 cir. 1967) cited by Petitioners would allow subsequent challenges where new

matter has been subsequently decided casting a new light upon the issues.

The Ninth Circuit in Dillenburg v. Kramer 469 F 2d. 1222, 1225 (5 Cir. 1972) has rejected petitioners' broad view of the effect of a summary decision by this Court.

> A summary affirmance without opinion in a case within the Supreme Court's obligatory appellate jurisdiction has very little precedential significance citing (Frankfurter & Landis, "The Business of the Supreme Court at October Term 1929" (1930) 44 Harv. L. Rev. 1, 14.

If summary affirmance is to be accorded little precedential value summary dismissal should be accorded even less.

The Effect Petitioners seek to give summary dismissals by this court work a substantial injustice upon parties seeking to challenge the validity of statutes which infringe upon their constitutional rights. One suit by one party on any constitutional issue either in state or federal court which was appealed to the Court would preclude all future litigation.

Such a broad interpretation of the effect of summary dismissal particularly unwarranted in view of this Court's policy of refusing to consider federal

questions which were not properly and timely raised in the courts below. Stern and Gressman Supreme Court Practice §3.27 (4th Ed. 1969). Issues which were not properly raised by the first party challenging statute would be forever lost to future litigants challenging similar statutes.

In summary, Petitioners urge upon this Court a concept of stare decisis in the nature of res judicata which would promote substantial injustice.

PETITIONERS SEEK TO RAISE FACTUAL ISSUES BEFORE THIS COURT WHICH WERE NOT RAISED BEFORE THE DISTRICT COURT OF THE COURT OF APPEALS AND THUS ARE REQUESTING THE COURT TO MAKE FINDINGS OR FACT WHICH ARE IN DIRECT CONTRADICTION WITH THE FINDINGS OF FACT OF BOTH LOWER COURTS.

Petitioners request the Court to make factual determinations which are in direct conflict with those of the two courts below. Both the District Court and the Court of Appeals found that there were no pending state criminal prosecutions against any of the Respondents at the time the suits were instituted.

This Court held that:

> "a court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by

questions which were not properly and timely raised in the courts below. Stern and Gressman Supreme Court Practice §3.27 (4th Ed. 1969). Issues which were not properly raised by the first party challenging statute would be forever lost to future litigants challenging similar statutes.

In summary, Petitioners urge upon this Court a concept of stare decisis in the nature of res judicata which would promote substantial injustice.

PETITIONERS SEEK TO RAISE FACTUAL ISSUES BEFORE THIS COURT WHICH WERE NOT RAISED BEFORE THE DISTRICT COURT OF THE COURT OF APPEALS AND THUS ARE REQUESTING THE COURT TO MAKE FINDINGS OR FACT WHICH ARE IN DIRECT CONTRADICTION WITH THE FINDINGS OF FACT OF BOTH LOWER COURTS.

Petitioners request the Court to make factual determinations which are in direct conflict with those of the two courts below. Both the District Court and the Court of Appeals found that there were no pending state criminal prosecutions against any of the Respondents at the time the suits were instituted.

This Court held that:

> "a court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by

two courts below in the absence of a very obvious and exceptional showing of error." Graver Mfg. Co. v. Linde Co., 336 U.S. 271, 275 339 U.S. 605; Berenyi v. Immigration Director 385, U.S. 630, 635.

WRIGHT,C. FEDERAL COURTS (1970)§ 108 p. 496, Stern & Gressman Supreme Court Practice(1969)§ 4.14.

THE DECISION BY THE COURT OF APPEALS THAT CONSIDERATIONS OF COMITY DO NOT DICTATE ABSTENTION BY THE DISTRICT COURT WHERE NO CRIMINAL PROSECUTIONS WERE PENDING AT THE TIME THE SUITS WERE INSTITUTED IS IN ACCORDANCE WITH THE PREVIOUSLY ANNOUNCED DECISIONS OF THIS COURT.

Petitioners argue that Younger v. Harris supra required the District Court to abstain from hearing petitioners suit for declaratory and injunctive relief when no criminal prosecutions were pending against Respondents at the time the proceedings in federal court were initiated. Nothing in Younger or its companion case, Samuels v. Mackell, 401 U.S. 66 (1971) supports this conclusion. In Younger the Court stated:

We express no view about the circumstances under which federal courts may act when there is no prosecution pending in state courts at the time the federal proceeding is begun.

401 U.S. at 41 (emphasis supplied).

Petitioners argue that the proper forum for Respondents to raise their constitutional challenges to a local ordinance statute is in the state court system, therefore, abstention by the District Court was appropriate. This Court squarely rejected that argument in Zwickler v. Koota 389 U.S. 241, 248, 251, (1967) holding:

> "Congress imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choise of a federal forum for the hearing and decision of his federal constitutional claims.....[W]e again emphasize that abstention cannot be ordered simply to give the state courts the first opportunity to vindicate the federal claim....We would defeat those purposes of the Civil Rights Act if we held that assertion of federal claim in a federal court must await an attempt to vindicate the same claim in state court."

The Court then dealt with the procedure for determining whether declaratory and injunctive relief were proper holding that the inappropriateness of injunctive relief was not a proper consideration in determining whether declaratory relief should be granted.

The principles expressed in Zwickler were elaborated upon in by Mr. Justice

Brennan, partially concurring and partially dissenting, in Perez v. Ledesma 401 U.S. 82, 92, (1971). After a lengthly discussion of the relevent precedents of this Court and the legislative history of the Declaratory Judgment Act of 1934, Mr. Justice Brennan concluded:

> Where no criminal prosecution involving the federal court parties is pending when federal jurisdiction attackes, declaratory relief determining the disputed constitutional issue will ordinarily be appropriate to carry out the purposes of the Federal Declaratory Judgment Act and to indicate the great protections of the Constitution

at 130.

The Court of Appeals expressly adopted the view of Mr Justice Brennan. It also relied upon the decision of this Court in Lake Carrier's Assoc. v. Mc Mullen 406 U.S. 498 (1972) stating

> The decisions there [Younger and Samuels v. Mackell] were premised on considerations of equity practice and comity in our federal system that have little force in the absence of a pending state proceeding. In that circumstance exercise of federal court jurisdiction ordinarily is appropriate if the conditions for declaratory or injunctive relief are met.

The decision of the Court of Appeals therefore, is clearly in accordance with the prior announced policies of this Court.

CONCLUSION

Petitioners have failed to assert any valid reason why this Court should grant certiorari. The opinion of the lower court is well reasoned and is in accord with existing legal precedents. The petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit should be denied.

Respectfully submitted,

Kenneth C. Hogge

Kenneth C. Hogge
Citizens & Marine Bank Bldg.
Hampton, Virginia
Counsel for Respondents